APPENDIX I.

OPINIONS OF LOWER COURTS (formal parts omitted)

OPINION OF THE TRIAL COURT
MEMORANDUM ON DECISION

This is a real estate mortgage foreclosure action with the plaintiff seeking foreclosure of a mortgage upon its complaint as to one property and the defendants Andy and Violet Johnson seeking foreclosure of two mortgages upon their cross complaint as to the same property and two other properties of the defendant Charles Henneman Company, an insolvent debtor. In turn the defendant United States of America by counterclaim makes claim for tax lien priority against all the mortgaged property, and Chippewa County by its answer makes claim for lien priority as to real estate taxes accruing since the filing of notice of the United States lien. During the pendency of the action the entire property has been sold pursuant to stipulation of the parties and the sale proceeds substituted for the parts thereof.

Under the facts found in this case the amount of the United States tax lien far exceeds the total sum realized from the sale of the debtor's property. Hence, application of the general priority which the United States has for taxes would leave nothing for the other lien claimants. Extensive briefs submitted on behalf of the United States support that result.

This view fails to give effect to Section 3672 of Title 26, United States Code, as it existed at the time in question which can only be considered as an amendment to the absolute priority of the United States and as a surrender of such priority to the extent required to pay existing mortgages. Thereupon the question arises whether a priority

for payment of real estate taxes arises as against the mortgage interests. If it does, the priority to the mortgages under the statute is largely absorbed because such taxes are against the whole property including that taken by the federal government under the lien which in turn is prior to that for real estate taxes. This has been described as a circular priority of liens and is much discussed in briefs submitted by counsel in this case.

It is not apparent how in the circumstances present the rights of lien claimants which are completely overriden by the encompassing size of the federal tax lien can in effect be revived. Without a mortgage on these premises there is nothing left for local real estate taxes, and accordingly where there is such a mortgage there is nothing after the mortgage to which such taxes can attach. It is the property, not the mortgage, which is taxable, and the federal lien has taken that.

Among the contentions advanced in briefs of counsel is that the mortgagees should even now be permitted to pay the real estate taxes and add the amount thereof to the mortgage debt. As herein indicated that is not necessary to maintain the preferred position of the mortgages, and it is most doubtful whether such procedure could be sustained as against the federal lien.

The dispute with reference to the erroneous description of premises mortgaged in Lot 1 of Block 5 of Mansfield's Addition and the correction thereof by subsequent mortgage so as to cover the north half instead of the east half of the lot is quite academic. In any event the erroneous description covers half of the premises intended and the proceeds from additional premises covered by this mortgage are more than adequate to pay the debt. Even so, the intention to mortgage the half of said lot which the

mortgager owned is clear, and the correction mortgage thereon must be given full effect.

OPINION OF THE WISCONSIN SUPREME COURT

Appeal from a judgment of the circuit court for Chippewa County: Clarence E. Rinehard, Circuit Judge. *Reversed.*

An action to foreclose three real estate mortgages. The plaintiff is seeking foreclosure of a mortgage upon its complaint as to one property and the defendants, Andy and Violet Johnson, are seeking foreclosure of two mortgages upon their cross complaint as to the same property and two other properties of the defendant Charles Henneman Company, an insolvent debtor. The United States of America by counterclaim makes claim for tax lien priority against all the mortgaged property, and Chippewa county by its answer makes claim for lien priority as to real estate taxes accruing since the filing of notice of the United States lien. During the pendency of the action the entire property has been sold pursuant to stipulation of the parties and the sale proceeds and all moneys are now held by the clerk of the circuit court.

Under the facts found in this case the amount of the United States tax lien far exceeds the total sum realized from the sale of the debtor's property.

During the insolvency proceedings and pursuant to stipulation of the parties in the foreclosure action, an order was entered on April 26, 1955, directing that the real estate be sold by Frank Hauptmann, assignee and receiver in the insolvency proceedings for the price of $60,500, free of all liens of the parties, and that the proceeds of said sale be substituted in the foreclosure for the real estate itself. The order further provided for the payment of said

sum of $60,500 to the clerk of court to be held by him under such conditions and restrictions as the Court shall direct and to abide the outcome and final determination and judgment in this action. Also in accordance with the stipulation of the parties that he pay from such sum one-third of the 1955 real estate taxes on such properties to be charged pro-rata against funds as allocated to each property on the sale thereof and the clerk on February 2, 1956, paid taxes accordingly in the amount of $900.40 and retains the balance of the sale proceeds in the form of United States savings bonds.

The Court found that pursuant to Sec. 3672, 26 U. S. C. A., Int. Rev. Code (1939), now Sec. 6323, the plaintiff and the defendants Andy and Violet Johnson are entitled to receive from the money so held by the clerk the amounts due for principal, interest, costs and attorneys' fees under the respective mortgages.

The Court entered judgment as follows: That there was due and owing to the plaintiff on June 20, 1959, under the note and mortgage the sum of $6,121.36, principal, $1,525.69, interest, together with attorneys' fees as provided in said mortgage in the sum of $350, and $162.10 being the taxable costs and disbursements in this action, the total being $8,159.15 together with interest on the same at the rate of four and one-half per cent per annum from June 20, 1959. It found that there was due and owing to Andy Johnson and Violet Johnson as of June 20, 1959, principal and interest on the note and mortgage of February 9, 1948, the sum of $24,893.32, attorney's fees $650, taxable costs and disbursements $100, and that there was due and owing defendants Andy and Violet Johnson as of June 20, 1959, on the note and mortgage dated February 13, 1951, the sum of $1,137.70, attorney's fees $100, a total

of the aforesaid sums of $26,881.02, together with interest thereon at the rate of four per cent per annum from the 20th day of June, 1959, until paid.

The Court ordered the clerk to pay these respective sums to the plaintiff and defendants Andy and Violet Johnson out of funds remaining in his hands from the sale of the mortgaged premises, and further adjudged that the clerk pay to the Internal Revenue Service of the United States the balance of the proceeds of the sale of the mortgaged premises remaining in his hands.

It is from this judgment that the defendant Chippewa County appeals.

DIETERICH, J. The Charles Henneman Company executed and delivered to the First National Bank of Chippewa Falls on January 6, 1948, its promissory note in the amount of $35,000 secured by a first mortgage on lots four, five and six, block nine, Allen's Addition to the City of Chippewa Falls. The mortgage was recorded in the office of the register of deeds for Chippewa County on January 9, 1948.

On February 9, 1948, the Charles Henneman Company executed and delivered its promissory note in the amount of $20,000 to Andy Johnson and Violet Johnson. The note was secured by a mortgage on lots four, five and six, block nine, Allen's Addition, lot eight, block five, Allen's Addition and the east one-half of lot one, block five, Mansfield's Addition. This mortgage was recorded in the register of deeds' office in the County of Chippewa on February 10, 1948.

On October 29, 1951, another mortgage was executed for $20,000 to Andy Johnson and Violet Johnson, which recited:

> "The north half of lot one, block five, Mansfield's Addition to the City of Chippewa Falls.

"This mortgage is given to correct the description as to the above described mortgaged premises which were erroneously described as the east half of lot one, block five, in that certain mortgage between the same parties, dated February 9, 1948, and recorded in the office of the register of deeds for Chippewa County, in Volume 154 of mortgages, page 43, document no. 247938."

This corrected mortgage was recorded in the office of the register of deeds of Chippewa County on November 2, 1951.

The United States of America filed a tax lien on April 20, 1951, with the register of deeds of Chippewa County against the real estate of the Charles Henneman Company in the amount of $96,827.82, pursuant to the provisions of the Internal Revenue Code.

The pleadings disclose that Frank Hauptmann was appointed assignee under the provisions of the Wisconsin insolvency statutes on January 11, 1954. The foreclosure proceedings were commenced on May 14, 1954.

The following stipulation was filed as a part of the foreclosure proceedings:

"It is hereby stipulated in this assignment for benefit of creditors proceedings, by the undersigned, who are parties plaintiff and defendant respectively in the action of foreclosure in this Court entitled The First National Bank of Chippewa Falls, a corporation, v. Chas. Henneman Co., et al., which is now pending, that the sale by the assignee for benefit of creditors, namely, Frank Hauptmann, of all of the remaining assets, real and personal, of the Chas. Henneman Co., for the total sum of $62,500 is hereby approved, and the funds to be allocated as to selling price as follows:

"Lots four, five and six, block nine, Allen's Addition to the City of Chippewa Falls	$49,000
Lot eight, block five, Allen's Addition to the City of Chippewa Falls	4,500
North one-half of lot one, block five, Mansfield's Addition to the City of Chippewa Falls	7,000
All remaining personal property	2,000
	$62,500

"It is stipulated and agreed that the sales proceeds of the real estate aforementioned, shall be substituted in the said foreclosure action for the real estate itself, with the parties to the said action having the same priorities, liens and rights in such proceeds as they would have had in said real estate.

"It is further understood and agreed that this stipulation is contingent upon the release by the proper governing authority of Chippewa County, Wisconsin, of its tax liens which have accrued or will accrue through its purchase of the tax certificates covering the aforesaid real estate covering the years 1951 and subsequent thereto, substituting the sales proceeds aforementioned in place of the real estate, the said county having the same priority, lien and rights in such proceeds as it would have had in the said real estate; and that the City of Chippewa Falls, Chippewa County, Wisconsin, shall release by proper governing authority, any tax lien it may have on the aforesaid real estate, substituting its claim against the sales proceeds of the real estate aforementioned, the said city to have the same priority, lien and rights in such proceeds, as it would have in the real estate.

"It is understood and agreed that the aforesaid offer of purchase and acceptance thereof by the said assignee for benefit of creditors provides that the said sale shall be closed on or before April 30, 1955, and if sale is not completed by that date the offer shall be null and void. In event of failure to close said sale by April 30, 1955, then this stipulation shall have no force and effect and shall be cancelled. It is understood and agreed that Frank Hauptmann, assignee for benefit of creditors, will, in accordance with the requirements of the Wisconsin law, pay the pro-rata share of the real estate taxes on the aforementioned real estate for the current year up to the time of conveyance by deed and transfer of possession to the purchasers. It is understood that this payment is without prejudice as to any claim of priority of the United States income excess profits and declared value excess profits tax lien and is made solely for the purpose of getting a record title to the real estate which is merchantable at the earliest possible date.

"Chas. Henneman Co., itself and by Frank Hauptmann, its assignee for benefit of creditors, does, in consideration of the foregoing agreement, waive any and all equity of redemption it may have in the aforesaid real estate and does expressly approve the said sale."

Pursuant to said stipulation, the Court entered the following order directing sale:

"In accordance with the stipulation on file herein, executed by Charles Henneman Co., Andy Johnson and Violet Johnson, the United States of America and Frank Hauptmann, as assignee for the benefit of creditors of Charles Henneman Co., either personally

or by their respective attorneys and in accordance with a resolution passed by the county board of supervisors, Chippewa County, Wisconsin.

"Now, therefore, on motion of the attorneys for each and all of the parties,

"It is ordered and directed that the real estate which is the subject of this foreclosure by the plaintiff and the defendants, Andy Johnson and Violet Johnson, be sold to Albert Perrenoud, Howard H. Post, Norman J. Nelson and Arthur R. Perrenoud, for the total price of $60,500, free and clear of any and all liens of The First National Bank of Chippewa Falls, the United States of America, Andy Johnson and Violet Johnson and said Chippewa County, the funds of said selling price to be allocated * * * (as set forth above).

"The said sales proceeds from the real estate aforementioned, based on aforesaid allocation of value, shall be substituted in this foreclosure action for the real estate itself, with each of the parties to this action having the same priorities, liens and rights in said proceeds as they, it, he or she would have had in the aforesaid described real estate.

"Further it is ordered that the said sum of $60,500 shall be paid over to John Ritzinger, clerk of this Court, to be held by him under such conditions and restrictions as the Court shall direct and to abide the outcome and final determination and judgment in this action.

"In accordance with the terms of the stipulation referred to above, the said clerk of court, at such time as the 1955 real estate taxes are determined and levied on aforesaid real estate, shall pay one-third of the 1955 tax thereon as the pro-rata share of seller, in

accordance with the sales agreement. Said expense to be a charge pro-rata against the funds as allocated above."

The following receipt dated July 6, 1955, was executed by the clerk of the circuit court for Chippewa County:

"Received of Frank Hauptmann, receiver of Charles Henneman Co., the sum of $60,500, with which I agree to purchase U. S. Savings bonds in said amount; the bonds to be held by me and my successors in office to abide the judgment of the Court in this action as to disposition of said funds.

"Further agreed that the bonds shall be placed for safe keeping with W. O. Kelly, Chippewa County treasurer and his successors in office and the actual control over the said bonds shall be joint with said Chippewa County treasurer."

The only question on the appeal before this Court is the allocation and distribution of the amount of $60,500 in government bonds in the possession of the clerk of the circuit court from the sale of the real estate on the basis of priority of the respective mortgagees, United States government tax lien and the Chippewa County delinquent real estate taxes.

Priority of mortgages and federal tax lien

The priority of the federal tax lien is controlled exclusively by federal law. The Charles Henneman Company was insolvent and an assignee and receiver had been appointed under the Wisconsin insolvency statute prior to the foreclosure proceedings. The stipulation provided that the sales proceeds of the real estate be substituted in the foreclosure action for the real estate itself, with the parties to have the same priorities, liens and rights in such proceeds as they would have had in the real estate.

Sec. 3670, 26 U. S. C. A., Int. Rev. Code, provides:

"*Property subject to lien.* If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448."

Sec. 3672, 26 U. S. C. A., Int. Rev. Code, provides:

"*Validity against mortgagees, pledgees, purchasers, and judgment creditors.*

"(a) *Invalidity of lien without notice.* Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector.

"(1) *Under state or territorial laws.* In the office in which the filing of such notice is authorized by the law of the state or territory in which the property subject to the lien is situated, whenever the state or territory has by law authorized the filing of such notice in an office within the state or territory; * * *."

In United States v. New Britain (1954), 347 U. S. 81, 88, 74 Sup. Ct. 367, 98 L. Ed. 520, the Court said:

"The United States is not interested in whether the state receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien."

See: Michigan v. United States (1943), 317 U. S. 338, 63 Sup. Ct. 302, 87 L. Ed. 312.

Under the present status of the federal law the federal tax lien attaches to all property belonging to the taxpayer and although the determination of property rights belonging to the taxpayer is a matter of application of state law, the priority of a government lien against such property is controlled by federal law. In the New Britain case, supra, the United States Supreme Court established the principle of "first in time, first in right," and the federal statutes specifically provide that the government lien shall not be valid as against liens filed prior to the filing of the notice by the collector. Sec. 3672, 26 U. S. C. A., Int. Rev. Code. Therefore, where, as here, there is a mortgage, recorded pursuant to state law prior to the recording of the federal tax claim, then the government can only resort to those proceeds from the sale of the property which are in excess of the mortgage indebtedness for satisfaction of its lien. River Rouge Savings Bank v. Victor Building Co. (1960), — Mich. —, 101 N. W. 2d 260.

It may be stated at this point that the mortgage of the Johnsons' recorded on the 29th day of October, 1951 (the original mortgage being recorded subsequent in point of time to the notice filed by the government) merely corrected the description of the real estate, no consideration having passed at that time. The record discloses that it was the clear intent of the Charles Henneman Company to secure the loan from the Johnsons by a mortgage on the north one-half of the lot owned by the company and not by the property described in the original mortgage to the Johnsons which property the company never owned.

The priority of the government's lien is only as to the excess of sale price over and above the sums due the First National Bank of Chippewa Falls and the Johnsons by virtue of their prior recorded mortgages. After the amount available to apply on the federal tax lien has been set

aside, state law is then applicable to determine the priorities between the mortgages and the real estate tax sale certificates. Samms v. Chicago Title & Trust Co. (1953), 349 Ill. App. 413, 111 N. E. 2d 172; River Rouge Savings Bank v. Victor Building Co., supra. See for a discussion of the problem: 13 The Business Lawyer (1958 No. 4), Certain Aspects of the Priority of Tax Liens, p. 642; American Bar Asso. Sec. of Taxation (1959 meeting), Report of the Committee on Federal Tax Liens and Collection Proceedings, p. 149; 83 Reports of American Bar Asso. (1958), Report of the Special Committee on Federal Liens, p. 454.

Distribution of the proceeds of the sale price in the hands of the clerk of the circuit court.

The trial court shall determine and set aside out of the proceeds of the sale price the total sum due and owing to the first mortgagee, First National Bank of Chippewa Falls, and the mortgagees, Andy Johnson and Violet Johnson, plus their respective interest, taxable costs, disbursements and attorneys' fees. The balance of said money shall be paid to the United States Government as and for complete liquidation of its lien and claim for unpaid federal taxes.

There being nothing left for distribution in so far as the real estate tax lien is concerned under the federal law, we now apply the state law as to priorities as between the First National Bank of Chippewa Falls, mortgagees, Andy and Violet Johnson, mortgagees, and Chippewa county real estate tax lien.

Priorities as between mortgagees and real estate tax liens under state law

Sec. 70.01, Stats. 1951, provides:

"*General property taxes; upon whom levied.* Taxes shall be levied, under the provisions of this chapter, upon all general property in this state except such as is exempted therefrom. Real estate taxes shall be deemed to be levied when the tax roll on which they are extended has been delivered to the local treasurer with his warrant for collection. When so levied such taxes shall be a lien upon the property against which they are assessed, superior to all other liens, effective as of May 1 in the year when levied, * * *."

"70.02, *Definition general property.* General property is all the taxable real and personal property defined in Sections 70.03 and 70.04 * * *."

"70.03, *Definition real property.* The terms 'real property,' 'real estate' and 'land,' when used in this title, shall include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto."

"70.10, *Assessment, when made.* The assessor shall begin as soon as practicable after the April election, if he is elected at such election, otherwise as soon as practicable after January first to assess all the real estate and personal property as of the close of the first day of May in each year. * * *."

"70.17, *Lands, to whom assessed; buildings on exempt lands.* Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name. The person holding the contract or

certificate of sale of any real property contracted to be sold by the state, but not conveyed, shall be deemed the owner for such purpose. The undivided real estate of any deceased person may be entered to the heirs of such person without designating them by name. The real estate of an incorporated company shall be entered in the same manner as that of an individual. Improvements on leased lands may be assessed either as real property or personal property."

"70.32. *Real estate, how valued.* (1) Real property shall be valued by the assessor from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale. * * *."

This Court has held in Will of Koehring (1939), 230 Wis. 533, 538, 284 N. W. 523:

"* * * in the absence of a clear and unambiguous statute specifically denying the state's right of priority, its right thereto exists as to all taxes by virtue of the common law."

The amended complaint discloses that the real estate taxes assessed for the years 1951, 1952 and 1953, were outstanding and unpaid.

In Fitch v. Wisconsin Tax Comm. (1930), 201 Wis. 383, 230 N. W. 37, this Court said:

"In the very opening sentence of Cooley on Taxation (3d ed.) we find it stated that 'Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs. The State demands and receives them from the subjects of taxation within its jurisdiction that it

may be enabled to carry into effect its mandates and perform its manifold functions, and the citizen pays from his property the portion demanded, in order that, by means thereof, he may be secured in the enjoyment of the benefits of organized society. The justification of the demands is therefore found in the reciprocal duties of protection and support between the state and those who are subject to its authority, and the exclusive sovereignty and jurisdiction of the state over all persons and property within its limits for governmental purposes.'

"The exaction of a tax can only be justified from one who is enjoying the protection of government either for himself or for his property."

The entire real estate, including all mortgagors and mortgagees interests in it, is assessed against the property as one unit, as defined in the statute and the rights of every person claiming any interest in the property by virtue of any lease, contract, mortgage or otherwise, is subject to the unpaid real estate tax liens. Aberq v. Moe (1929), 198 Wis. 394, 224 N. W. 132, 226 N. W. 301.

Sec. 70.01, Stats., accords priority to general property taxes and when levied such tax liens have priority over all other liens which would include recorded mortgages. River Rouge Savings Bank v. Victor Building Co., supra. Will of Koehring, supra.

It therefore follows that the mortgage interests of the First National Bank of Chippewa Falls and Andy Johnson and Violet Johnson are subject to the payment of the outstanding taxes.

The trial court shall determine the amount of real estate taxes due and unpaid on lots four, five and six, block nine, Allen's Addition, and they shall be paid in inverse

order so as to maintain the integrity of the first mortgage. In other words, the taxes shall be paid out of the moneys set aside for the second mortgage and if such sum is not sufficient such remaining balance shall be paid out of the sums of money held for payment of the first mortgagee. The remainder of the properties are covered by a first mortgage held by the Johnsons, and are subject and chargeable for the taxes due on each respective parcel. Inasmuch as the proceeds of sale have been substituted for the land, any rights of subrogation of any of the parties should be preserved in the judgment. All rights to redeem from the sale of the mortgaged lands have in effect been waived by the stipulation.

The judgment of the trial court is reversed, with instructions to enter judgment in accordance with this opinion.

By the Court—Judgment reversed, with instructions for the trial court to enter judgment in accordance with this opinion.

APPENDIX II.

TEXT OF STATUTORY PROVISIONS INVOLVED

I. Constitutional Provisions.

Article XIV, Sec. 1, United States Constitution:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. United States Statutes Involved.

28 U. S. C. 1257(3):

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By Writ of Certiorari; where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States."

26 U. S. C. 3670:

"Property subject to lien. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person"

26 U. S. C. 3672:

"Validity against mortgagees, pledgees, purchasers, and judgment creditors. (a) Invalidity of lien without notice. Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditors until notice thereof has been filed by the collector— (1) Under State or Territorial laws. In accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; * * *".

26 U. S. C. 3704(c)(2):

"If the proceedings of the secretary, or his delegate as set forth have been substantially in accordance the provisions of law, such deed shall be considered, and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto."

III. Wisconsin Statutes Involved:

1951, Sec. 70.01:

"*General property taxes; upon whom levied.* Taxes shall be levied, under the provisions of this chapter, upon all general property in this state except such as is exempted therefrom. Real estate taxes shall be deemed to be levied when the tax roll on which they are extended has been delivered to the local treasurer with his warrant for collection. When so levied such taxes shall be a lien upon the property against which they are assessed, superior to all other liens, effective as of May 1 in the year when levied. * * *"

1951, Sec. 70.02:

"*Definition general property.* General property is all the taxable real and personal property defined in Sections 70.03 and 70.04 * * *."

1951, Sec. 70.03:

"*Definition real property.* The terms 'real property', 'real estate' and 'land', when used in this title, shall include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto."

1951, Sec. 70.10:

"*Assessment, when made.* The assessor shall begin as soon as practicable after the April election, if he is elected at such election, otherwise as soon as practicable after January first to assess all the real estate and personal property as of the close of the first day of May in each year * * *."

1951, Sec. 70.17:

"*Lands, to whom assessed; buildings on exempt lands.* Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name. The person holding the contract or certificate of sale of any real property contracted to be sold by the state, but not conveyed, shall be deemed the owner for such purpose. The undivided real estate of any deceased person may be entered to the heirs of such person without designating them by name. The real estate of an incorporated company shall be entered in the same manner as that of an individual. Improvements on leased lands may be assessed either as real property or personal property."

1951, Sec. 70.32(1):

"*Real estate, how valued.* (1) Real property shall be valued by the assessor from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale * * *."

1951, Sec. 278.10(4):

"Foreclosure. (4) The court may order in the judgment of foreclosure that all sums advanced by the plaintiff for insurance, necessary repairs and taxes not included in the judgment may be added to the judgment by order at any time after the entry thereof."

APPENDIX III.

EXCERPTS FROM RECORD SHOWING WHERE FEDERAL QUESTIONS WERE RAISED

JOHNSONS' ANSWER AND CROSS-COMPLAINT

"18 * * * that the United States of America, as these defendants are informed and verily believe, asserts that its lien is superior to the right of these defendants as mortgagees to pay the delinquent real estate taxes accruing on the mortgaged premises subsequent to the effective date of the lien of the United States of America, and to add the amounts to the amount owing these defendants as said mortgagees; * * *"

"* * * that after payment of the amounts due plaintiff, these defendants be paid out of the proceeds the amounts adjudged and determined to be owing them * * *."

"* * * that this Court adjudge and determine the right of the plaintiff and these defendants under the terms of their respective mortgages to pay the real estate taxes on the mortgaged premises accruing subsequently to the effective date of the lien of the United States of America * * *."

BANK'S SECOND AMENDED COMPLAINT

"* * * that the plaintiff be paid the amount due on said note and mortgage, with interest to the time of such payment, together with the costs and disbursements of this action and $350.00 attorney's fees and such additional amounts as the plaintiff may advance for payment of taxes * * *."

JOHNSONS' TRIAL COURT BRIEF

"* * * the defendants Johnsons stand ready to pay the taxes if they can claim the protection of the claim in their mortgages * * *."

"Consequently, the defendants Johnsons submit that they have the contractual right to pay the delinquent real estate taxes and add such amounts so paid to the amount of their mortgage indebtedness, which is entitled to priority against the Government, under Section 2672, or, in the alternative, that, if such mortgagees cannot obtain for such payment of delinquent real estate taxes the same priority as the mortgage indebtedness is entitled to under Section 3672, then the municipality cannot constitutionally overleap the intervening Government lien and take from the mortgagee that portion of the mortgagees' security which equals the amount of the delinquent real estate taxes.

"These mortgagees offer another suggestion for the consideration of the Court. We are dealing with equitable principles, and the mortgagees contend that if they have to pay real estate taxes out of their mortgage funds, such taxes should be based upon the mortgagees' share of the real estate, and not on the entire assessed valuation of the real estate. This lawsuit demonstrates very clearly that, after deducting the mortgagees' share of the real estate, the balance of the real estate actually belongs to the United States. The United States does not have title to the real estate, because it has not foreclosed its lien; and, therefore, technically the local municipality might still have some legal basis for assessing real estate taxes; but, it does not have any equitable basis for

requiring the mortgagees to pay taxes on the entire assessed valuation. The application of this principle is important with reference to the principal piece of property. As to the other two pieces of property, there would be no argument. However, on the principal piece of property, the balance owing the plaintiff and the defendants Johnsons would approximate $16,000.00; whereas, the property has an assessed valuation of some $90,000.00. Where everything beyond the $16,000.00 belongs to the United States Government, why should not a court of equity limit the municipality's recovery of delinquent real estate taxes to that based upon the amounts owing on the first and second mortgages?"

COUNTY'S TRIAL COURT BRIEF

"* * * the proposition about to be discussed by this author has been well discussed by Mr. Wiley, counsel for the defendants Johnson, as to the Court's permitting the mortgagees to pay the real estate taxes; and this writer concurrs (sic) with the argument made there and that which is said here is merely in addition to, or emphasis upon, what has been said there * * *."

BANK'S TRIAL COURT BRIEF

"* * * However, the solution which seems best, is the last discussed—that of letting the mortgagees pay the real estate taxes and add that amount to their debt * * *."

"plaintiff, therefore, believes that this Court should adopt a solution which treats the first mortgagee as fairly and equitable (sic) as possible. Although any

of the proposed solutions might apply, the fairest one, and the one which conforms most closely to the law, is to allow the mortgagees to pay the real estate taxes and add them to their debt * * *."

COUNTY'S SUPREME COURT BRIEF

"Section 278.10(4) provides that the Court may order in the judgment of foreclosure that all sums advanced by the plaintiff for taxes not included in the judgment may be added to the judgment by order at any time after the entry thereof. The county, by obtaining an assignment of the judgment, could claim this right to add the taxes to the judgment."

"* * * In the present case the federal government contended that the income tax lien was prior to the mortgages. If this were true, the mortgagees could not add taxes to their liens, and the defendant county could not afford to buy the judgment. The defendants had the right to wait until the Court ruled on this contention, before deciding whether their rights of subrogation and redemption were of any value."

JOHNSONS' SUPREME COURT BRIEF

"* * * While the United States Supreme Court has not ruled on this specific point (see United States v. New Britain, supra, page 88) some federal courts have held that mortgagees cannot add local tax payments to the mortgage at the expense of the Government.

"* * * These respondents call the Court's attention to the provisions of their mortgages allowing them to pay the taxes (Exs. 4, 5, R. 146, 147; A. App. 147, 151). Respondents call particular attention to the

language in Exhibit 4, the mortgage they hold on the business site, that they are authorized to 'expend any sum of money necessary to preserve the lien of said mortgagee upon said premises, in payment of taxes (insurance money), or otherwise * * *' (R. 146, A. App. 147). These respondents submit that if the County has to be paid out of the mortgage interest, then the Fifth Amendment of the United States Constitution will require the Supreme Court of the United States to hold that the mortgagees are entitled to reimbursement out of the proceeds of the sale of the land ahead of the Government. The alternative is for that Court to hold that the State of Wisconsin cannot require the mortgagee to pay subordinate local taxes based on the assessed valuation of the mortgagor's interest, as well as the mortgagee's."

BANK'S SUPREME COURT BRIEF

"* * * Appellant argues that if the mortgagees lose their interest here it is due to their own fault, first, because they should have paid the county's taxes and added them to their mortgage debt as against the Federal Government, and, second because they should have foreclosed as soon as possible.

B. *There is a conflict in the decisions of the federal courts as to whether or not a mortgagee may pay local real estate taxes at the expense of the federal lien.*

On the argument that the mortgagees could pay the county taxes at the expense of the Federal lien, there is a conflict in the decisions of the Federal courts of appeal, which probably means that a decision by this Court allowing the mortgagees to pay the taxes

would be appealed to the United States Supreme Court * * *."

"* * * In this case, after the Federal lien attached to the property, there were two interests in the property —the mortgagees, and the federal government. The federal government owned the Henneman Company's interest. Concededly, the state cannot tax the Federal government's interest. It is also obvious that the state *does not* tax the mortgagee's interest, although it could. How then can there be any lawful tax levied after. March 21, 1951, when the federal lien attached? * * *"

"* * * In summary, then, we submit that when the Federal lien attached to the property the Federal government became the owner of the Henneman Company's interest. The Federal government is exempt from the County tax. State law does not pretend to tax a mortgagee's interest separately. Therefore, no tax can be levied.

If any tax can be constitutionally levied, it can only be a tax based on the sale value of the mortgagee's interest. * * *"

APPENDIX IV.

JUDGMENT OF TRIAL COURT PURSUANT TO SUPREME COURT MANDATE

JUDGMENT

This action having been tried before the Court at the October, 1954, term of said court, with Ingolf E. Rasmus appearing for the plaintiff, Marshall A. Wiley appearing for the defendants Andy Johnson and Violet Johnson, George E. Rapp, United States Attorney, appearing for the defendant United States of America, Marshall Norseng appearing for the defendant Frank Hauptmann, receiver of Charles Henneman Company, and Eugene R. Jackson, District Attorney, appearing for Chippewa County, and the Court having made and entered findings of fact and conclusions of law, which are of record herein, and having entered judgment on July 8, 1959, and Chippewa County having appealed from the whole of said judgment to the Supreme Court of the State of Wisconsin, by which court the said judgment was on the 3rd day of May, 1960, reversed and remanded with instructions for the trial court to enter judgment in accordance with the opinion of the Supreme Court; and due notice of such remittance and of application for this judgment having been given, and proof of such notice having been filed,

And the motion of Chippewa County for judgment in accordance with the mandate of the Supreme Court having come on to be heard on this 19th day of July, 1960, and Chippewa County having appeared by Eugene R. Jackson, District Attorney, and John Frampton, Special Counsel, and the First National Bank of Chippewa Falls having appeared by James B. Halferty, its attorney, Andy Johnson and Violet Johnson having appearing in person

and by Marshall A. Wiley, their attorney, and the United States of America having appeared by George E. Rapp, United States Attorney, appearing by Robert J. Kay, Assistant United States Attorney, and there being no appearance by Charles Henneman Company or Frank Hauptmann as receiver of Charles Henneman Company, and the Court having determined that the amounts due and owing to the First National Bank of Chippewa Falls on its mortgage against Lots 4, 5 and 6, Block 9 of Allen's Addition are as follows:

Principal	$6,121.36
Interest	1,825.69
	$7,947.05
Solicitor's Fees	350.00
Taxable Costs	162.10
Total	$8,459.15

and that the amounts due and owing to Andy Johnson and Violet Johnson on the mortgage which is a second mortgage on Lots 4, 5 and 6, Block 9, Allen's Addition, and a first mortgage on Lot 8, Block 5, Allen's Addition, and the N½ of Lot 1, Block 5, Mansfield's Addition, are as follows:

Principal	$20,000.00
Interest	5,755.56
	$25,755.56
Solicitor's fees	650.00
Taxable costs	100.00
Total	$26,505.56

and the amounts due and owing Andy and Violet Johnson on their second mortgage against Lot 8, Block 5 are as follows:

Principal	$ 900.00
Interest	276.60
	$1,176.60
Solicitor's fees	None
Taxable costs	100.00
	$1,276.60

and that the amounts due and owing to Chippewa County for real estate taxes, including interest for the month of July, 1960, are as follows:

Lots 4, 5 and 6, Block 9	
Taxes	$14,346.23
Interest	9,674.59
Total	$24,020.82
Lot 8, Block 5	
Taxes	$ 758.20
Interest	509.77
Total	$1,267.97
N½ Lot 1, Block 5	
Taxes	$ 766.92
Interest	518.16
Total	$1,285.08

and that the total amounts due and owing to the mortgagees are as follows:

Bank mortgage	$ 8,459.15
Johnson Mortgage No. 1	26,505.56
Johnson Mortgage No. 2	1,276.60
	$36,241.31

and the clerk having informed the Court that the proceeds of sale of the mortgaged premises, which were in the amount of $59,599.60, have increased to the sum of $66,-881.52, and it therefore appearing that the balance to be allocated to the United States on its tax lien is the difference, namely:

Fund held by clerk	$66,881.52
Due on mortgages	36,241.31
United States	$30,640.21

and it further appearing to the Court that the fund should be allocated to the mortgaged premises as follows:

	Original	Now
Lot 8	$ 4,438.13	$ 4,980.39
Lot 1	6,933.60	7,780.76
	$11,371.73	$12,761.15
Lot 4, 5 & 6	48,227.87	54,120.37
	$59,599.60	$66,881.52

and it appearing to the Court that the total amount owing on the Johnson mortgages against Lots 1 and 8 exceeds the total amount allocated to those parcels, and that the entire proceeds of Lots 1 and 8 should first be applied against the total due on the Johnson mortgages in order to

determine the amount remaining to be set aside for the Johnson mortgage from the proceeds of Lots 4, 5 and 6, as follows:

Johnson mortgage No. 1	$26,505.56
Johnson mortgage No. 2	1,276.60
Total	$27,782.16
Proceeds Lot 8	4,980.39
	$22,801.77
Proceeds Lot 1	7,780.76
Balance from Lots 4, 5 and 6	$15,021.01

and it therefore appearing that the amounts set aside for the mortgagees from the three parcels are as follows:

Lot 8, Johnsons	$ 4,980.39
Lot 1, Johnsons	7,780.76
Lots 4, 5 and 6, Bank	8,459.15
Lots 4, 5, 6, Johnsons	15,021.01
Total for mortgagees	$36,241.31

and that in order to preserve the integrity of the Bank's first mortgage as to Lots 4, 5 and 6, the Johnsons' share of the proceeds of these lots must first be resorted to for payment of the real estate taxes, as follows:

Taxes Lots 4, 5 and 6	$24,020.82
Johnsons' share (to County)	15,021.01
Balance of Tax	$8,999.81
Bank's share (to County)	8,459.15
Tax not collectible	$ 540.66

and it appearing that the amounts set aside for the Johnson mortgages from Lots 8 and 1 will be sufficient to pay the terms on those lots, leaving amounts payable to the Johnsons as follows:

Set aside, Lot 8	$4,980.39
Less tax to County	1,267.97
Difference to Johnsons	$3,712.42
Set aside, Lot 1	$7,780.76
Less tax to County	1,285.08
Difference to Johnsons	$6,495.68

and it therefore appearing that in accordance with the mandate of the Supreme Court the fund of $66,881.52 in the hands of the clerk should be distributed as follows:

		United States	County	Johnsons
United States	$30,640.21	$30,640.21		
County	1,267.97		$ 1,267.97	
Johnsons	3,712.42			$ 3,712.42
County	1,285.08		1,285.08	
Johnsons	6,495.68			6,495.68
County	15,021.01		15,021.01	
County	8,459.15		8,459.15	
	$66,881.52	$30,640.21	$26,033.21	$10,208.10

SUMMARY

United States	$30,640.21
Chippewa County	26,033.21
Johnsons	10,208.10
First National Bank	None
	$66,881.52

Now, therefore, on motion of Eugene R. Jackson, District Attorney, and John Frampton, Special Counsel,

It is adjudged that there is now due and owing to the First National Bank of Chippewa Falls, on its mortgage against Lots 4, 5 and 6, Block 9 of Allen's Addition to the City of Chippewa Falls, as of the 19th day of July, 1960, the sum of $6,121.36 principal and the sum of $1,825.69 interest, together with $350.00 solicitor's fees as provided in said mortgage, and $162.10 being the taxable costs and disbursements in this action, amounting in all to the sum of $8,459.15.

It is further adjudged that there is now due and owing to Andy Johnson and Violet Johnson on their mortgage against Lots 4, 5 and 6, Block 9, Allen's Addition, and against Lot 8, Block 5, Allen's Addition, and the North Half of Lot 1, Block 5, Mansfield's Addition, the sum of $20,000.00 principal and the sum of $5,755.56 interest, together with $650.00 solicitor's fees and $100.00 taxable costs in this action, amounting in all to the sum of $26,505.56.

It is further adjudged that there is now due and owing to Andy Johnson and Violet Johnson on their mortgage against Lot 8, Block 5, Allen's Addition to the City of Chippewa Falls, the sum of $900.00 principal and $276.60 interest, together with $100.00 taxable costs in this action, amounting in all to the sum of $1,276.60.

It is further adjudged that pursuant to stipulation of the parties to this action, the proceeds of sale of the mortgaged premises have been substituted for the land and that Lot 8 is now represented by the sum of $4,980.39 in the hands of the clerk and the North Half of Lot 1 is now represented by the sum of $7,780.76 in the hands of the clerk and that Lots 4, 5 and 6 are now represented by the sum of $54,120.37 in the hands of the clerk, and that the entire fund now amounts to $66,881.52.

It is further adjudged that the amounts due and owing to Chippewa County for delinquent real estate taxes on Lots 4, 5 and 6 are $14,146.23 taxes and $9,674.59 interest, in all the sum of $24,020.82, and that the amounts due and owing to Chippewa County for delinquent real estate taxes on Lot 8 are $758.20 taxes and $509.77 interest, in all the sum of $1,267.97, and that the amounts due and owing to Chippewa County for delinquent real estate taxes on the North Half of Lot 1 are $766.92 taxes and $518.16 interest, in all the sum of $1,285.08.

It is further ordered and adjudged that from the fund in his hands the clerk shall, at the expiration of ten days after the date of entry of this judgment, pay to the Internal Revenue Service of the United States the sum of $30,640.21 and to Chippewa County the sum of $26,033.21 and to Andy Johnson and Violet Johnson the sum of $10,208.10.

It is further ordered that in the event of any further increase in the fund prior to payment, application shall be made to the Court for an order relative to the disposition of such increase.

It is further ordered that within the period of ten days after the date of entry of this judgment, any party to this action may exercise the right of subrogation.

Dated July —, 1960.

By the Court:
Clarence E. Rinehard,
Circuit Judge.